**RAJA ABDUL MALEK MUZAFFAR SHAH BIN RAJA SHAHRUZZAMAN** *a*

**v.**

**SETIAUSAHA SURUHANJAYA PASUKAN POLIS & 2 ORS.**

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' SITI NORMA YAAKOB JCA *b*
DATO' M. SHANKAR JCA
[CIVIL APPEAL NO. A 01-10 OF 1994]
30 JANUARY 1995

***ADMINISTRATIVE LAW:*** *Dismissal of Police Officer - Whether breach of natural justice - Procedural fairness - Oral hearing - Show cause letter with charges sent to plaintiff - Police Services Commission took into consideration the plaintiff's explanation and 'other information' ("serta lain-lain maklumat") in arriving at its decision to dismiss the plaintiff - No evidence to show that 'other information' was ever put to plaintiff - No opportunity given to the plaintiff to comment upon those other information - Deprivation of the plaintiff's livelihood and reputation - Police Officers (Conduct and Discipline) General Orders Cap. "D" 1980 GO 26.* *c*

***CONSTITUTIONAL LAW:*** *Natural justice - Disciplinary proceedings against public officer - Federal Constitution Article 135(2).* *d*

This was an appeal from the decision of the High Court, Ipoh which dismissed the plaintiff's claim for a declaration that his dismissal from the Police Force was null and void and of no effect as being in breach of Article 135(2) of the Federal Constitution and for other consequential relief. Hence this appeal to the Court of Appeal. *e*

The plaintiff was until his dismissal a member of the Royal Malaysian Police Force holding the rank of Assistant Superintendent of Police. By letter dated 16 December 1988, the Secretary of the Police Services Commission wrote to the plaintiff framing four charges and informing him of the Commission's decision to institute disciplinary proceedings against him under Para 26 of Chapter D of the General Orders. The Commission required the plaintiff to respond to this show cause letter. By letters dated 13 January 1989 and 16 October 1989, the plaintiff gave his explaination as to why disciplinary proceedings should not be taken against him. The plaintiff was dismissed by letter dated 4 April 1990 from the Secretary of the Police Services Commission which stated that the Commission had taken into consideration the plaintiff's explanations given in his two letters, "serta lain-lain maklumat". *f* *g*

However, as the plaintiff was dissatisfied with the decision of the Police Services Commission, he filed the writ of summons at the High Court, Ipoh which *inter alia* sought declarations that the dismissal was unlawful, null and void and breached Article 135(2) of the Federal Constitution and for reinstatement.

**Held:** *h*

**[1]** The proposition that the right to be heard does not in all cases include the duty to afford an oral hearing is well settled by binding precedent and that there can be no breach of a duty where none exists is axiomatic. Nevertheless, the principle that the right to be heard is non-inclusive of a duty to afford an oral hearing does not mean that the failure or refusal to afford such a hearing would render the decision reached safe and harmless from *i*

attack. Cases may arise where, in the light of peculiar facts, the failure to afford an oral hearing may result in the decision arrived at being declared a nullity or quashed.

**[2]** The categories of procedural fairness are not closed and the procedure adopted in a particular case may be fair or otherwise according to its own facts. The measure of fairness afforded to a particular plaintiff is a question of fact and of degree that is to be judged according to our own standards and values and not according to the standards and values of a foreign Judge, however eminent. That is not to say that valuable assistance cannot be obtained from other sources, but in the final analysis it is a question that is to be decided according to the Malaysian concept of fairness.

**[3]** On the facts of the present case there was no departure from procedural fairness by the defendants' failure to afford the plaintiff the oral hearing he had asked for. The charges were well drafted and care was taken to ensure that full particulars were provided. A reasonable man similarly circumstanced as the plaintiff would have had no difficulty in responding to the allegations made. Sufficient opportunity was given in the making of representations to rebut the charges, including the provision of documents requested for by the plaintiff. The suggestion by Counsel that there is an added duty to provide documents without any request being made in that behalf is devoid of merit and is not supported by authority.

**[4]** In the circumstances of the present case, it could only be concluded that the absence of an oral hearing did not occasion any prejudice to the plaintiff and further, the plaintiff did not suffer any substantial detriment in consequence of the deprivation complained of.

**[5]** The letter of dismissal dated 4 April 1990 when read as a whole and the words "serta lain-lain maklumat yang berkaitan," when read in the light of all the surrounding circumstances would leave a reasonable man with the distinct impression that the defendants considered and gave weight to certain material information that was never put to the plaintiff.

**[6]** The decisions in the cases of *Shamsiah bte. Ahmad Sham v. Public Services Commission* and *Kanda v. The Government of the Federation of Malaya* support the proposition that a fair procedure includes the duty of an arbiter not to take into account matters that have not been first put to the accused and he given an opportunity to rebut or to comment upon the same.

*[Appeal allowed with costs. Decision of High Court set aside. Judgement entered in terms of declarations sought. Claim for damages dismissed]*

**[Bahasa Malaysia** Translation of Headnote**]**

***UNDANG-UNDANG PENTADBIRAN**: Pemecatan pegawai polis - Sama ada memungkiri keadilan asasi - Keadilan prosedur - Perbicaraan lisan - Surat menunjukkan sebab dengan tuduhan-tuduhan yang dikirimkan kepada plaintif - Suruhanjaya Perkhidmatan Polis mempertimbangkan penerangan plaintif "serta lain-lain maklumat" dalam mencapai keputusannya untuk memecat plaintif - Tiada keterangan bahawa lain-lain maklumat dirujuk kepada plaintif - Tiada peluang diberikan kepada plaintif untuk mengulas mengenai maklumat-maklumat yang lain itu - Perlucutan mata pencarian dan reputasi - Perintah Am Pegawai Polis (Displin & Kelakuan) Bab "D" 1980 GO 26.*

***UNDANG-UNDANG PERLEMBAGAAN**: Keadilan asasi - Prosiding displin terhdap pegawai polis - Perlembagaan Persekutuan Perkara 135 (2)*

Ini merupakan satu rayuan daripada keputusan Mahkamah Tinggi, Ipoh yang menolak tuntutan plaintif untuk satu pengisytiharan bahawa pemecatan beliau daripada Pasukan Polis adalah batal dan tak sah dan tidak mempunyai kesan kerana memungkiri Perkara 135 (2) Perlembagaan Persekutuan dan untuk relief lain yang bersampingan. Dengan itu rayuan ini dikemukakan kepada Mahkamah Rayuan.

Plaintiff adalah sehingga pemecatan beliau merupakan seorang ahli Pasukan Polis Di Raja Malaysia yang memegang jawatan Timbalan Penguasa Polis. Melalui surat bertarikh 16 Disember 1988, Setiausaha Suruhanjaya Perkhidmatan Polis telah menulis kepada plaintif merangkakan 4 pertuduhan dan memaklumkan tentang keputusan Suruhanjaya untuk memulakan prosiding tatatertib terhadap beliau di bawah perenggan 26 Bab D Perintah-Perintah Am. Suruhanjaya tersebut menghendaki plaintif menjawab surat menunjukkan sebab ini. Melalui surat-surat bertarikh 13 Januari 1989 dan 16 Oktober 1989, plaintif telah memberikan penjelasan mengapa prosiding tatatertib tidak seharusnya diambil terhadapnya. Plaintif telah dipecat melalui surat bertarikh 4 April 1990 daripada Setiausaha Suruhanjaya Perkhidmatan Polis yang menyatakan bahawa Suruhanjaya tersebut telah mempertimbangkan penjelasan-penjelasan plaintif yang diberikan dalam kedua-dua suratnya, "serta lain-lain maklumat".

Walaubagaimanapun, oleh kerana plaintif tidak berpuashati dengan keputusan Suruhanjya Perkhidmatan Polis, beliau telah menfailkan writ saman di Mahkamah Tinggi, Ipoh yang mana antara lain memohon pengisythiran bahawa pemecatan tersebut adalah salah di sisi undang-undang, batal dan tak sah dan memungkiri Perkara 135(2) Perlembagaan Persekutuan dan untuk penempatan semula.

**Diputuskan:**

**[1]** Proposisi bahawa hak untuk didengar tidak dalam kesemua kes-kes termasuk kewajipan bagi membolehkan satu perbicaraan lisan telah diselesaikan oleh duluan yang mengikat dan bahawa kemungkiran kewajipan tidak timbul di mana ianya tidak wujud adalah jelas. Namun demikian, dasar bahawa hak untuk di dengar adalah tidak termasuk kewajipan untuk mendapatkan perbicaraan lisan tidak bermaksud bahawa kegagalan atau keengganan bagi mendapatkan perbicaraan yang sedemikian akan menjadikan keputusan tercapai dan terselamat daripada serangan. Kes-kes mungkin timbul di mana, memandangkan fakta-fakta yang anih, kegagalan untuk mendapatkan perbicaraan lisan mungkin akan mengakibatkan keputusan yang dicapai diisytiharkan sebagai suatu pembatalan atau dibatalkan.

**[2]** Kategori-kategori keadilan prosedur tidak ditutup dan prosedur yang dipakai dalam sesuatu kes yang khusus mungkin adil atau sebaliknya menurut fakta-faktanya yang tersendiri. Ukuran keadilan yang diberikan kepada plaintif yang tertentu adalah persoalan fakta dan peringkat yang kena dihakimi menurut standard dan nilai-nilai kita yang tersendiri dan bukannya menurut standard serta nilai-nilai seorang Hakim asing, walaupun terkenal. Adalah tidak boleh diperkatakan bahawa bantuan yang benilai tidak boleh diperolehi dari sumber-sumber yang lain, tetapi dalam analisa muktamad ianya merupakan persoalan yang harus diputuskan menurut konsep keadilan Malaysia.

**[3]** Menurut fakta-fakta kes semasa tidak terdapat penyimpangan daripada keadilan prosedur oleh kegagalan defendan untuk memberikan plaintif perbicaraan lisan yang dipinta. Dakwaan telah diderafkan dengan baik dan penghematan telah diambil bagi memastikan bahawa butir-butir yang lengkap telah diberikan. Seseorang yang telah berada dalam keadaan yang sama seperti plaintif tidak akan mengalami kesukaran dalam bertindakbalas kepada pengataan-pengataan yang dibuat. Peluang yang memadai telah diberikan dalam pembuatan pengemukaan-pengemukaan untuk menyangkal dakwaan-dakwaan tersebut, termasuk pemberian dokumen-dokumen yang dikehendaki oleh plaintif. Saraan Peguam bahawa terdapat kewajipan tambahan untuk mengemukan dokumen-dokumen tanpa diminta adalah tidak bermerit dan tidak disokong oleh autoriti.

**[4]** Dalam keadaan kes semasa, ianya hanya boleh diputuskan bahawa ketiadaan perbicaraan lisan tidak menyebabkan apa-apa kemudartan kepada plaintif dan selanjutnya, plaintif tidak mengalami apa-apa kerugian yang substantial akibat daripada perlucutan yang diadukan.

**[5]** Surat pemecatan yang bertarikh 4 April 1990 apabila dibaca pada keseluruhannya dan perkataan-perkataan "serta lain-lain maklumat yang berkaitan," apabila dibaca dalam keadaan yang meliputinya akan menjadikan seseorang bertanggapan jelas bahawa defendan telah menimbangkan dan memberikan penekanan kepada beberapa maklumat material yang tidak pernah dikemukakan kepada plaintif.

**[6]** Keputusan-keputusan dalam kes *Shamsiah bte Ahmad Shah lwn. Public Services Commission* dan *Kanda lwn. The Government of the Federation of Malaya* menyokong proposisi bahawa sesuatu prosedur yang adil adalah termasuk kewajipan seorang penimbang-tara untuk tidak menimbangkan perkara-perkara yang telah tidak dikemukakan terdahulu kepada tertuduh dan beliau diberikan peluang untuk menyangkal atau mengulasnya.

[*Rayuan dibenarkan dengan kos. Keputusan Mahkamah Tinggi diketepikan. Penghakiman dimasukkan menurut pengisytiharan yang dipohon. Tuntutan bagi gantirugi ditolak]*

**Cases referred to:**

*Ong Ah Chuan v. Public Prosecutor [1981] AC 648 p. 670-671* ***(refd)***
*Dewan Negeri Kelantan v. Nordin bin Salleh [1992] 1 MLJ 697* ***(refd)***
*Najar Singh v. Government of Malaysia [1976] 1 MLJ 203* ***(foll)***
*Ghazi bin Mohd Sawi v. Mohd. Haniff bin Omar [1994] 2 MLJ 114* ***(foll)***
*R. v. Immigration Appeal Tribunal [1977] 1 WLR 795* ***(refd)***
*Rohana v. University Sains Malaysia [1989] 1 MLJ 487* ***(cit)***
*Kanda v. The Government of The Federation of Malaya [1962] MLJ 169* ***(foll)***
*Shamsiah bte Ahmad Sham v. Public Services Commission [1990] 3 MLJ 364* ***(foll)***
*Commodore Pty Ltd. v. Perpetual Trustee [1984] 1 NZLR 324 p. 349* ***(refd)***

**Legislation referred to:**

Federal Constitution, Articles 132(1), 135(2)

*For the appelant - Mr. A. Iruthayaraj (V. T. Singam with him); M/s V. T. Singam & Co.*
*For the respondent - Raja Ahmad Faridz bin Raja Mazlan, SFC*

**JUDGMENT**

**Gopal Sri Ram JCA:**

*Introductory remarks*

This is an appeal from the decision of Ong See Seng J, dismissing the plaintiff's claim for a declaration that his dismissal from the Police Force is null and void as being in breach of Article 135(2) of the Federal Constitution and for consequential relief. At the conclusion of argument on 17 January 1995, we allowed the appeal, indicating at the time that reasons for the decision would be given and these are now delivered. For convenience I will refer to the parties before us as 'plaintiff and 'defendants' respectively.

*The facts*

The plaintiff was, until his dismissal that is the subject of the present challenge, a member of the Royal Malaysian Police Force holding the rank of assistant superintendent. On 16 December 1988, the Secretary of the Police Services Commission (the 1st defendant) wrote to the plaintiff informing him of the Commission's decision to institute disciplinary proceedings

against the plaintiff under paragraph 26 of Cap. "D" of the General Orders to which the plaintiff was subject. In the same letter there were formulated four charges upon which the Commission required the plaintiff to respond. In a gist, the charges included gross dereliction of duty, corruption and the making of a false entry.

Let it be said at once that the charges set out in the said letter, if proved, were most serious in nature warranting dismissal. Let it also be said that each of the charges was most carefully framed and with utmost particularity, so that the plaintiff should have had no difficulty in understanding their purport and in responding to them. The letter afforded the plaintiff 16 days within which to answer the charges in question.

The plaintiff, having received this letter on 30 December 1988, responded to it by a letter dated 13 January 1989. Apart from giving a very full explanation to the allegations made against him, he drew the Commission's attention to the fact that the charges related to events that had allegedly taken place some two years previously and requested for an oral hearing before what he described as an "Independent Tribunal". He also requested for the station diary for the relevant period to enable him to refresh his memory of those past events to which the charges related so as to enable him to make a more meaningful response.

The documents requested for by the plaintiff were made available to him in September 1989. The plaintiff then made a further response by his letter dated 16 October 1989.

No oral hearing was held. Instead, by a letter dated 4 April 1990, the 1st defendant informed the plaintiff of the Commission's decision to dismiss him with effect from the date of that letter. It states that the Commission had taken into consideration the plaintiff's explanations in his two letters, **"serta lain-lain maklumat"** (meaning, no doubt other information relevant to the charges), in coming to its decision. The letter does not identify this "other information". Nor is there any evidence on record to show that this other information was ever put to the plaintiff and he given an opportunity to comment upon it. I will say more about this later.

The trial of this action for a declaration that the dismissal was void took place on 16 June 1994. The plaintiff gave evidence and was subjected to cross-examination. At the close of the plaintiff's evidence, his case was closed, whereupon Senior Federal Counsel who appeared for the defendants informed the Judge that he was electing not to call any evidence and that he would stand on his submission that there was no case to answer. The Judge then heard submissions of Counsel and reserved his decision, to 21 July 1994 on which date he dismissed the plaintiff's claim with costs. No reasoned judgment was delivered. However there is a brief note of the learned Judge's reasons for the decision he arrived at which I now reproduce below:

> From the evidence before me, the plaintiff has admitted that he read and he understood contents of the charges against him. He also agreed he was given opportunity to reply and rebut the allegations which he did by letter dated 13 January 89 and also by a further reply P1.
>
> The plaintiff before submitting P1 requested to be furnished with 2 documents and they were furnished to him. He did not request for other documents. On the evidence it is my finding that the plaintiff had been granted every opportunity to be heard and offer his explanation. The right to be heard does not necessarily mean to be heard orally before the Commission. It is also my finding that in P1 the plaintiff had waived his request for an oral hearing and he had also put his points of mitigation. As such I hold that there has been no breach of the rules of natural justice and the defendants had been fair in the conduct of the proceedings.
>
> Accordingly I dismiss the plaintiff's claims herein with costs.

*The Argument of Counsel*

Before us, Counsel for the plaintiff repeated the submissions that were advanced before the learned Judge. I do not believe that I render any injustice to Counsel by my summarising his submissions in the following manner.

Counsel's primary submission was that the defendant was under a duty to act fairly towards the plaintiff in the matter of his dismissal. This duty included the obligation to afford the plaintiff the oral hearing that he had requested of the defendants. The deprivation of an oral hearing, Counsel argued, was an unfair procedure which resulted in the deprivation of the plaintiff's constitutional right to a reasonable opportunity to be heard which is entrenched in Article 135 (2) of the supreme law of the Federation.

Counsel's alternative and narrower submission was that the plaintiff, in the particular circumstances of this case, had in any event not been given a reasonable opportunity of being heard. He submitted that this was because the defendants had, when arriving at their decision to dismiss the plaintiff, taken into account material information which had never been put to the plaintiff with an accompanying opportunity to comment upon that information.

In the view that we took of the law as settled by high authority, Counsel for the defendants was not called upon to respond, to the plaintiff's primary submission, but to limit his reply to the plaintiff's alternative submission.

Counsel's first submission in response was that the words "serta lain-lain maklumat" appearing in the 1st defendant's letter of 4 April 1990, were mere surplusage and should be ignored. His second submission was that the subject-matter of the complaint in the plaintiff's alternative submission was not sufficiently pleaded in his statement of claim and for that reason was not admissible. Thirdly, he argued that the plaintiff's complaint was without merit because the plaintiff had readily agreed under cross-examination that he had had the opportunity to reply and to rebut the allegations made against him, a factor that appears to have weighed heavily in the mind of the Judge when he came to dismiss the plaintiff's claim. Counsel's fourth submission, which I can only describe as startling, was that the defendants were entitled to take into account other information when deciding to dismiss the plaintiff without making that information available to the plaintiff and without giving him any opportunity to comment upon it.

At the heart of the plaintiff's primary submission lies the concept of procedural fairness in its widest application. I prefer the term 'procedural fairness' to the traditional nomenclature "rules of natural justice". It is a concept that includes but is not limited to the rules of natural justice. It is a very interesting area of the law. When I commenced writing this judgment I was sorely tempted to deal with the full breadth of the argument advanced by Counsel. It would have involved, amongst other matters, a historical examination of the concept of procedural fairness, a discussion on the effect upon administrative actions of the humanising provisions of Article 8(1) as explained by the Privy Council in *Ong Ah Chuan v. Public Prosecutor* [1981] AC 648 at pages 670-671 and, of course, a consideration of the full impact of the landmark decision in *Dewan Negeri Kelantan v. Nordin bin Salleh* [1992] 1 MLJ 697. It is, as I have said, a very interesting area of the law that has offered me much temptation to enter upon a discussion of it.

But the route I am compelled to take to arrive at my conclusion in this case has made it unnecessary to deal with the wider aspect of Counsel's primary submission. Anything I say about it would therefore be wholly unrelated to the real issues in this appeal. Consequently,

I have, learning from the primordial lesson, resisted the forbidden fruit of *obiter dicta* and have instead, elected to tread upon the safer path of *ratio decidendi.* The choice that I have made requires me to deal with so much of the plaintiffs complaint in his primary submission that has to do with he not having been given an oral hearing.

*Procedural Fairness: The Right to an Oral Hearing*

When he first opened the appeal, Counsel took the extreme position that the doctrine of procedural fairness entitled the plaintiff *ex debito justitae* to a right to an oral hearing once a request for such a hearing was made, as had happened in this case. However, under the pressure of argument he had to retreat from his original submission and adopt the more sensible stand that in the particular and peculiar circumstances of this case the failure to afford an oral hearing constituted procedural unfairness.

The proposition that the right to be heard does not in all cases include the duty to afford an oral hearing is well settled by binding precedent. (See *Najar Singh v. Government of Malaysia* [1976] 1 MLJ 203; *Ghazi bin Mohd Sawi v. Mohd. Haniff bin Omar* [1994] 2 MLJ 114). That there can be no breach of a duty where none exists is axiomatic.

Nevertheless, the principle that the right to be heard is non-inclusive of a duty to afford an oral hearing does not mean that the failure or refusal to afford such a hearing would render the decision reached safe and harmless from attack. Cases may arise where, in the light of peculiar facts, the failure to afford an oral hearing may result in the decision arrived at being declared a nullity or quashed. (See *R. v. Immigration Appeal Tribunal* [1977] 1 WLR 795).

The categories of procedural fairness are not closed and the procedure adopted in a particular case may be fair or otherwise according to its own facts. The measure of fairness afforded to a particular plaintiff is a question of fact and of degree that is to be judged according to our own standards and values and not according to the standards and values of a foreign Judge, however eminent. That is not to say that we cannot obtain valuable assistance from other sources: but in the final analysis it is a question that is to be decided according to the Malaysian concept of fairness.

On the facts of the present case there was, in my opinion, no departure from procedural fairness by the defendants' failure to afford the plaintiff the oral hearing he had asked for. The charges were well drafted and care was taken to ensure that full particulars were provided. A reasonable man similarly circumstanced as the plaintiff would have had no difficulty in responding to the allegations made. Sufficient opportunity was given in the making of representations to rebut the charges, including the provision of documents requested for by the plaintiff. The suggestion by Counsel that there is an added duty to provide documents without any request being made in that behalf is devoid of merit and is not supported by the well reasoned and comprehensive judgment of Edgar Joseph Jr., J. (as he then was) in *Rohana v. University Sains Malaysia* [1989] 1 MLJ 487 which was cited to us and in which all the relevant authorities were collected and reviewed.

I have, in the circumstances of this case, no hesitation whatsoever in concluding that the absence of an oral hearing did not occasion any prejudice to the plaintiff. I am also entirely satisfied that he did not suffer any substantial detriment in consequence of the deprivation complained of.

*Procedural Fairness: The Alternative Submission*

I now turn to deal with Counsel's alternative and more formidable argument that there was procedural unfairness meted out to him by reason of the defendants having taken into account

material which was never made available to him and upon which he was never given an opportunity to comment. It turns upon the question whether he was deprived of his constitutional right to which I shall now refer.

Now, the right of a member of any of the services set out under Article 132(1) of the Federal Constitution (and the plaintiff is such a member) in the matter of his or her dismissal or reduction in rank is enshrined in Article 135(2) which provides as follows:

> (2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard.

This Article has been the subject of curial scrutiny in several cases, of which *Kanda v. The Government of The Federation of Malaya [1962]* MLJ 169, is the *locus classicus* upon the subject and in which Lord Denning made the following statement of principle:

> In the opinion of their Lordships, however the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *Nemo judex in causa sua:* and *Audi alteram partem.* They have recently been put in the two words Impartiality and Fairness. But they are separate concepts and are governed by separate considerations. In the present case Inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard.
>
> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, LC in *Board of Education v. Rice* down to the decision of their Lordship's Board in *Ceylon University v. Fernando.* It follows, of course, that the Judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the Judge without his knowing. Instances which were cited to their Lordships were *Re Gregson, Rex v. Bodmin Justices* and *Goold v. Evans* to which might be added *Rex v. Architects Registration Tribunal,* and many others.
>
> Applying these principles their Lordships are of opinion that Inspector Kanda was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby J. in these words: "In my view, the furnishing of a copy of the Findings of the Board of Inquiry to the Adjudicating Officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the plaintiff, amounted to such a denial of natural justice as to entitle this Court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal." The mistake of the police authorities was no doubt made entirely in good faith. It was quite proper to let the adjudicating officer have the statements of the witnesses. The Regulations show that it is necessary for him to have them. He will then read those out in the presence of the accused. **But their Lordships do not think it was correct to let him have the Report of the Board of Inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice.** (Emphasis supplied).

Pausing for a moment, I would observe that a literal reading of the judgment in *Kanda* may lead one to believe that an oral hearing is a *sine qua non* to the due observance of procedural fairness. Indeed this was the conclusion drawn by Counsel for the plaintiff in support of his primary submission. But the opinion of the Board in that case must be read in its proper context: for the appellant there had indeed been given an oral hearing during the course of which the departures complained of by Inspector Kanda occurred. The decision in *Kanda* is no authority for the proposition that there must **in every case** be an oral hearing in order for there to be procedural fairness.

The plaintiff's alternative submission rests on the letter of dismissal dated 4 April 1990 which by reason of its importance, I had better reproduce. Omitting all the formal parts, it reads in substance as follows:

> Saya dengan hormatnya memaklumkan bahawa Suruhanjaya Pasukan Polis setelah menimbang dengan teliti alasan-alasan tatatertib yang dihadapkan ke atas tuan seperti surat S.P.P.(R) 211/ 5/1 KLT.4 bertarikh 16 Disember 1988 dan jawapan yang diberikan oleh tuan melalui surat (PR) G/3798 bertarikh 21 Januari 1989 dan surat (PR) G/3798 bertarikh 16 Oktober 1989 **serta lain-lain maklumat yang berkaitan** maka Suruhanjava Pasukan Polis dengan ini mengambil keputusan mengenakan hukuman buang kerja terhadap tuan berkuatkuasa mulai daripada tarikh surat ini diserahkan kepada tuan. (The emphasis is mine).

The letter when read as a whole and the words that I have emboldened and emphasised, when read in the light of all the surrounding circumstances would leave a reasonable man with the distinct impression that the defendants considered and gave weight to certain material information that was never put to the plaintiff. Of course, it was always open to the defendants to have given a full explanation as to what was meant by that critical phrase. For example, it might have been explained away as mere surplursage, having no meaning. It would then have behoved the Judge to decide whether to accept such an explanation. But the defendants took the option of remaining silent: and all that I am left with are the printed words: and they mean what they say. To imply that words uttered in such an important context, especially in a case that has to do with the deprivation of a man's livelihood and reputation, are mere surplusage is to exceed the limits of the judicial function.

All that I have said thus far, in effect, disposes of the defendants' first submission.

From the note made by the learned Judge it appears that he did not address his mind to this aspect of the case at all, despite a submission made in that behalf. This is a serious misdirection which has, in my view, occasioned a miscarriage of justice.

In *Shamsiah bte Ahmad Sham v. Public Services Commission* [1990] 3 MLJ 364, the appellant was dismissed by the respondent for negligence and dereliction of duty. In arriving at its decision, the respondent had taken into account the appellant's record of past conduct without giving her an opportunity to explain or controvert its contents. The Supreme Court struck down the dismissal. There are three passages in the judgment of Jemuri Serjan SCJ (as he then was) that merit reproduction. They appear at pages 367, 368 and 369 and read as follows:

> The core of the appellant's complaint in regard to the breach of the rules of natural justice was the fact that the first respondent, in arriving at its decision to dismiss her from service, took to account extraneous matters, namely, the appellant's record of past conduct which were entered in her record of service and produced by the Director-General of the Government Printers Department, Kuala Lumpur to the first respondent without giving her an opportunity to explain, contradict or rebut them.

a

> What we are saying is that if these materials which have such damning effect on her case are to be used against her she should be given a right to be heard on them. It is not a matter of pure technicality but it is absolutely fundamental in law that the appellant should have been given an opportunity of stating her case regarding her past conduct, considering that the dismissal of a civil servant is no light matter.
>
> We wish to add that it has been held that tribunals must not continue privately to obtain
b evidence or other information between the conclusion of the hearing and the making of the decision, without notifying the parties so as to give them an opportunity to make submissions on it. See for example *R v. Deputy Industrial Injuries Commissioner, ex p Jones* and *Fairmont Investments Ltd v. Secretary of State for the Environment.*
>
> It was manifestly demonstrated to us that the first respondent had infringed the rule of natural justice in not affording the appellant the opportunity to explain or controvert her
c record of service which played a part in influencing its decision to impose the severest punishment permissible under the 1969 Regulations. On this ground and based on the authorities we have cited in our judgment we have no alternative but to allow this appeal.

These passages and the judgment in *Kanda (supra)* support the proposition that a fair procedure includes the duty of an arbiter not to take into account matters that have not been first put to the accused and he given an opportunity to rebut or to comment upon the
d same.

That brings me to the defendants' second argument, which is that the point now under consideration was never raised by the plaintiff in his pleaded case. There is certainly a reference to the letter of dismissal in paragraph 8 of the statement of claim accompanied by an allegation in paragraph 9 that the plaintiff had not been given a reasonable opportunity
e of being heard.

I respectfully agree with the observation made during the course of argument by my learned sister, Siti Norma Yaakob JCA, that once the fairness of the procedure adopted was sufficiently raised and challenged, then all matters relevant thereto were put in issue without the need for a further specific plea in that respect. The object of modern pleadings is to prevent surprise and to enable disputes to be litigated in an orderly fashion: *Commodore Pty Ltd. v. Perpetual*
f *Trustee* [1984] 1 NZLR 324 at page 349.

I really do not see how the defendants can complain that they were taken by surprise; more so when they made no complaint before the trial Judge when the point was raised by Counsel for the plaintiff in his submissions. Further, there is nothing in the Judge's note to say that the argument was being disregarded because it was not pleaded. In these circumstances, I am convinced that there is no merit in the pleading point.
g

I now turn to the third submission made on behalf of the defendants which is based on an alleged fatal admission made by the plaintiff during his evidence. According to the Judge's note this is what the plaintiff said under cross-examination:

> I agree I have the opportunity to reply and rebut the allegations made against me.

h This brief acknowledgement by the plaintiff, according to Counsel, amounts to a concession by the plaintiff that procedural fairness was meted out to him and has the sweeping effect of precluding the plaintiff from making any complaint whatsoever about the procedure preceding his dismissal. A reading of the learned Judge's note which he made when dismissing the action shows that he too felt the same way.

i In my judgment, there are two reasons for dissenting from the submission of Counsel and the view formed by the Judge. Firstly, the response by the plaintiff is nothing more than an

agreement upon a patently obvious matter: for it is but true that the letter of 16 December 1988 did give the plaintiff an opportunity to answer the charges formulated against him. Worse it would have been if the defendants had not even afforded the plaintiff such a basic right. Too much has been read into this rather unequivocal answer extracted under cross-examination.

Second, the question whether one accused of misconduct has been treated with procedural fairness is a mixed question of law and fact. It is a question of law as to what the fundamentals of fair procedure are: and this is fairly well worked out in the decided cases. It is a question of fact and of degree as to whether on the facts of a particular case these fundamentals were duly complied with. The point here is that whilst the plaintiff was given an opportunity to rebut the material in the charges levelled against him, (as he conceded) he was given no opportunity to deal with the "serta lain-lain maklumat yang berkenaan" because no notice whatsoever was given of this material until after the dismissal became effective. In my judgment, the so-called admission, even assuming for a moment that it is indeed an admission, is of no consequence whatsoever for it dwells upon an opinion which the law leaves with the Court.

For these reasons, I reject the third argument advanced by Counsel for the defendants.

That brings me to the fourth and final argument of learned Federal Counsel which I have already described as startling. No authority was cited in support of the proposition that an adjudicating body may *ex-parte* take cognisance of material information against an accused. Indeed, all authority upon the point is against the submission made and I need do no more than refer to the decision in *Shamsiah (supra)* which in fact goes the other way. The fourth submission is without merit, is against the weight of authority and is accordingly rejected.

*Conclusion*

For the reasons advanced hereinbefore the appeal was allowed. The decision of the High Court was set aside; judgment was entered in terms of the declaration sought in prayer (a) and the order for reinstatement claimed in prayer (c) of the statement of claim, while the claim for damages in prayer (d) was dismissed. We also ordered the respondents to pay the costs of the appeal and those incurred in the Court below. The usual order that the deposit paid into Court be refunded to the appellant was also made.